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460

December 19, 2003

Jonathan G. Katz  
Secretary  
U.S. Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549-0609

Re: SEC Shareholder Access Proposal, File No. S7-19-03

Dear Mr. Katz,

We are taking this opportunity to submit comments on the SEC's proposal to permit, under certain circumstances, long-term shareholders access to company proxy materials to nominate directors. Specifically, we are writing in support of the proposed rules, which we believe will help increase the accountability of boards of directors to company shareholders.

Marshfield Associates is a firm of investment counsel. As such, we manage individual accounts pursuant to a highly concentrated buy-and-hold strategy. Our levels of concentration, along with our low rate of turnover, mean that certain of our clients might at times qualify either to propose a triggering resolution or nominate a director. And all of our clients would benefit from the enhanced corporate accountability that we believe would be a direct by-product of these rules. Certainly, among the many areas upon which our analysis of companies in which we establish positions for our clients focuses, issues of corporate governance, management integrity, and shareholder friendliness are paramount. We believe that expanded access to proxy ballots – even if only by certain shareholders, under certain circumstances – will vastly increase board accountability to shareholders in general.

We are attaching comments submitted by Institutional Shareholder Services, whose perspective on this issue aligns with our own. We commend the Commission for its efforts on behalf of shareholders and urge it to continue to institute meaningful reforms to repair investor confidence.

Sincerely,

Elise J. Hoffmann  
Principal

**ISS Viewpoint**

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**SEC Shareholder Access Proposal**



INSTITUTIONAL SHAREHOLDER SERVICES

## **ISS Viewpoint: SEC Shareholder Access Proposal**

The Securities and Exchange Commission is considering a landmark rule on director nominations by shareholders. The proposed rules would allow major, long-term shareholders access to company proxy materials to nominate directors in cases where either of two triggering events suggest a failure to heed shareholder views. In addition, the Commission recently adopted new disclosure rules for nominating committees.

The two triggering events would be:

- Withhold votes for at least one director totaling more than 35 percent of the votes cast at an annual meeting after Jan. 1, 2004.
- A majority vote on a resolution requesting shareholder access at an annual meeting after Jan. 1, 2004. To be eligible to submit such a resolution, a shareholder or group of shareholders must own more than 1 percent of the company's stock for one year. The company would then be required to include in its materials the nomination proposed by shareholders owning more than 5 percent of the company's stock continuously for two years.

The nominee must be independent of both the nominating group of shareholders and the company. In the words of the SEC, the nominating group must affirm in a notice to the company that the nominee is independent of the nominating group and, in addition, meets the objective criteria for independence from the company as set forth in the listing standards of a national securities exchange or national securities association.

A board with eight or fewer directors would be required to include only one nominee; a board with nine to 19 directors, no more than two nominees; and a board with 20 directors or more, up to three nominees. If a company receives more nominees than required, the nominees from the largest shareholder group would take precedence.

A shareholder or group of shareholders seeking control of the company would be ineligible to nominate a director. Furthermore, the rule would only apply where shareholders are permitted by state law to nominate a candidate for election. According to an SEC official, the states where most public companies are incorporated, including Delaware, do give shareholders that right.

The SEC will reach a final decision on the proposal after the public comment period ends on Dec. 22. Following is ISS's point of view, which does not necessarily reflect that of our clients.

### **Does ISS Support the SEC's Proposed Rules for Shareholder Ballot Access?**

Yes, ISS supports the proposals, which will allow reasonable access to significant investors to place their nominees on the corporation's proxy ballot.

### **Why?**

Reform is needed to right a steeply tilted playing field, in which management and board incumbents dominate the elections process. Moreover, shareholder access will build on the Sarbanes-Oxley Act and the new corporate governance listing standards. While those reforms enhance boardroom oversight of management, ballot access will enable shareholders to hold boards of directors more accountable.

## How will the proposals prevent special-interest abuses?

The rule provides numerous safeguards:

- Triggering events must take place before qualified shareholders can nominate directors
- Authority to nominate director candidates will be limited to significant, long-term investors
- Contests for corporate control are excluded
- Nominees must satisfy listing standards for independence
- Nominees must win a contested election to join the board

## Should the SEC make any changes to the proposal?

Yes. In urgent cases, shareholders need to respond right away to redress egregious problems, without waiting for the two-step process (triggering event and then nomination) to play out over two years or more. Therefore, shareholders or groups of shareholders who have significant, long-term stakes in the company should have the unfettered right to propose candidates even in the absence of a triggering event.

The bar for unfettered authority should be set high. If the SEC keeps the current thresholds (1 percent ownership to propose a triggering resolution and 5 percent ownership to nominate a director), then eligibility for the unfettered right to nominate a director should be set at 10 percent. As an even better alternative, we recommend that the SEC adjust its thresholds to require 1 percent ownership to file a resolution calling for shareholder nominations; 3 percent ownership for the right to make nominations after a triggering event; and 6 percent ownership for the unfettered right to nominate director candidates.

## What other reforms should the SEC adopt?

We recommend three:

- **Eliminate broker voting.** The SEC should curtail ballot-box stuffing at annual shareholder meetings by financial intermediaries who are allowed to vote clients' shares on "routine" items if they receive no instructions from those clients. In the current corporate governance environment, there are no routine voting items. In June, the SEC approved NYSE listing standards that ban uninstructed broker votes on equity compensation plans. The Commission should extend the ban to all resolutions on the ballots of all publicly listed companies.
- **Remove the proposed disqualification** of nominees who are affiliated with the nominating shareholders. The proposal also requires nominees to meet exchange standards on independence, and that qualification alone is sufficient. Moreover, alignment between the nominee and nominating shareholders can have benefits. A shareholder who owns a significant amount of shares should be able to nominate affiliated individuals.
- **Disclose timely post-election reports.** The current rules for reporting the outcome of annual shareholder meetings are inadequate, with companies allowed to wait until the filing of their next quarterly report to offer voting results. The SEC should require meaningful and accurate real-time disclosure of vote results.

## How will the proposed reforms improve corporation governance?

The rule promises to have a dramatic impact, focusing shareholder energy and producing positive outcomes. Triggers will transform vote-no campaigns at recalcitrant companies from the symbolic to the critical. Corporations will gain new incentives to remove dead wood from their boards, and they are likely to prove more responsive on non-binding (precatory) proposals. By improving corporate governance, shareholder access will help restore investor confidence.